
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ALJ CASE NO. 86-ERA-23
DATE: January 6, 1998

In the Matter of:

JOSEPH J. MACKTAL, JR.
COMPLAINANT,

v.

BROWN AND ROOT, INC.
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

In 1992, Congress amended the whistleblower provisions of the Energy Reorganization Act of 1974, among other things, to provide explicit protection for employees who make internal safety or health complaints to their employer. Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (Supp. IV 1992), as amended by the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, 3123. Prior to the effective date of those amendments, the Secretary had repeatedly and consistently interpreted the ERA to protect internal complaints and that interpretation had been upheld in every United States Circuit Court of Appeals where it had been addressed, but one. *See Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926,

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931-933 (11th Cir. 1995), and cases discussed therein. The Fifth Circuit has refused to follow that majority interpretation, holding instead that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under [the ERA] . . . ." *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029

(5th Cir. 1984) In *Ebasco Constructors Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 19, 1993), it emphatically rejected an explicit opportunity to reconsider *Brown & Root,* which has been characterized as a "literal, hypertechnical and overly narrow reading" of the ERA. *Neal v. Honeywell, Inc.* 826 F. Supp. 266, 271 (N.D. Ill. 1993).

Nevertheless, as the Secretary has recognized, "[An administrative agency] is not a court nor is it equal to [a] court in matters of statutory interpretation." *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (1983), quoting from *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), quoted in *Lockert v. Pullman Power Products Corp.*, Case No. 84-ERA-15, Sec'y. Dec. Aug. 19, 1985, slip op. at 3. We consider ourselves bound by the Fifth Circuit's interpretation of the pre-1992 ERA in any case, such as this, arising in that Circuit.

BACKGROUND

The lengthy and somewhat tortured history of this case is described in *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1155 (5th Cir. 1991), and *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec'y. Order Disapproving Settlement and Remanding Case, Oct. 13, 1993. After over a decade of tangential disputes, we have now reached the merits.

Complainant Joseph J. Macktal, Jr. worked as a journeyman electrician and electrical foreman for Respondent, Brown & Root, Inc., on the construction of the Comanche Peak Steam Electric Station (CPSES) nuclear power plant from January 1985 to January 1986. Administrative Law Judge Recommended Decision and Order Dismissing Complaint (R. D. and O.) at 2. Beginning in May or June 1985, Macktal was a night shift foreman of a crew inspecting electrical conduit, comparing the completed work with design drawings and travelers[1] to insure it had been installed according to the drawings and specifications. T. (Transcript of hearing) 80-81. He made several internal safety complaints to his immediate supervisor and other managers, that proper installation and paperwork procedures had not been followed, T. 89-90, and alleges he was demoted from foreman to journeyman in September 1985 and harassed on several occasions for making these complaints. R. D. and O. at 3. Among other acts of harassment, Macktal asserted he was given a "counseling report" on January 2, 1986 for excessive absences in retaliation for his safety complaints. *Id;* C (Complainant's exhibit) 17.

On his last day of work for Brown & Root, January 3, 1986, Macktal submitted a handwritten memorandum response objecting to the counseling report and indicating

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he planned to file a complaint with the Nuclear Regulatory Commission about the safety of CPSES. *See* C - 2. In that memorandum, Complainant said "[i]n a[n] effort to preserve my mental health and avoid any further harassment, I wish to be relieved of my duties until the TEC, NLRB, NRC can resolve these matters." C-2. Brown & Root discharged

Macktal that day. R (Respondent's exhibit) 32. But Complainant testified that he did not actually make his safety complaints to the NRC until February or March 1986, T. 90, months after his employment with Brown & Root ended.

The ALJ found that Macktal did not present a *prima facie* case because he did not show that he engaged in activity protected under the Fifth Circuit's interpretation of the pre-1992 ERA. The ALJ discussed at length the events of January 3, 1986, Macktal's last day of work, and found that Macktal "was about to engage in protected activity on the day of his termination," R. D. and O. at 8, but that he did not show that was the reason for his termination. The ALJ concluded that Brown & Root had a legitimate reason to discharge Macktal, namely his own request to be relieved of his duties. R. D. and O. at 9.

Macktal excepted to the R. D. and O. on several grounds: (1) Respondent is not entitled to summary judgement or, alternatively, that Macktal was denied an opportunity to brief the merits of the case; (2) on the merits, Macktal rebutted Brown & Root's stated legitimate reason for discharging him; (3) the ALJ erred in finding that Macktal quit; and (4) Macktal's request on his last day to be relieved of his duties was a protected refusal to work under *Pensyl v. Catalytic, Inc., Case No. 83-ERA-2, Sec'y. Dec.* Jan. 13, 1984, and its progeny. Macktal also attacks the impartiality of the ALJ and asserts that he acted improperly in admitting and excluding certain exhibits and in his conduct of the hearing. In addition, Macktal seeks attorney's fees and costs in the event the Board remands the case to the Office of Administrative Law Judges for a new hearing. Finally, Macktal, for the first time, requests attorney's fees and costs for prevailing on his claim that the 1987 settlement agreement, which ultimately was rejected by the Secretary, violated the ERA.

DISCUSSION

Alleged bias of ALJ

The record in this case has been reviewed and we find no evidence that the ALJ was biased or favored one party over another. The fact that the ALJ may have looked at some of Respondent's exhibits before they were actually introduced in evidence does not show bias or prejudgement of the issues, particularly where the allegedly mishandled exhibits (Respondent's Exhibits 21-30) were peripheral to the central issues in the case, as discussed below.

Macktal asserts the ALJ demonstrated bias by reviewing certain "prejudicial" material about his past criminal record, but the ALJ had to review this material to exercise his discretion whether to admit it in evidence for any of the purposes for

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which it was offered.[2] *See* 29 C.F.R. §§18.29, 18.402, 18.609 (1997). The ALJ gave careful consideration to the admission in evidence of this material, *see* T. 354-57; 372-389, sustained Macktal's counsel's objections, T.357, and the documents were not

included in the record. T. 389.[3] We find no evidence that review of this material influenced the ALJ's findings. *Midland Banana and Tomato Co. v. United States Dep't of Agriculture*, 104 F.3d 139, 142 (8th Cir. 1997) (admitting evidence of prior misdeeds did not prejudice ALJ). Macktal also claims that the ALJ showed bias by refusing to sign an order sealing the documents concerning Macktal's criminal record. As noted above, these documents were never admitted in evidence, T. 389, and they are not included in the court reporter's looseleaf binder of "RESPONDENT'S EXHIBITS."[4] Finally, Macktal claims the ALJ demonstrated bias by excessive questioning of witnesses and by assisting Respondent's counsel. An ALJ, of course, has the authority to question witnesses directly, 29 C.F.R. §18.614(b), and we find the ALJ did not abuse that authority in this case and did not improperly "assist" Respondent's counsel. *See, e.g.,* T. 494- 501; 1087.

Protected Activity

We reject at the outset Macktal's argument that he has been denied a full opportunity to address the merits in this case because the ALJ only permitted the parties to submit briefs on Brown & Root's motion for summary judgment.[5] Macktal has fully briefed the merits before the Board and, as the final agency decision maker, we have "all the powers which [the ALJ] would have in making the initial decision . . . ." 5 U.S.C. §557(b) (1988).

There is no dispute that Macktal did not contact any government agency about his safety complaints until several months after he was discharged. Macktal's counsel said in his opening statement "Mr. Macktal . . . reported his concerns to the Nuclear Regulatory Commission after he left Comanche Peak. * * * * [W]e are not going to present evidence that Mr. Macktal went to the NRC during the course of his employment." T. 51; *see also* T. 236. Nevertheless, nowhere in either brief filed with the Board does Macktal discuss or even mention *Brown & Root, Inc. v. Donovan* and its narrow rule of protected activity. We find that Macktal did not engage in any activity protected under *Brown & Root, Inc. v. Donovan* and therefore each of the alleged incidents of harassment and discrimination before the date of discharge, even if we accept Macktal's version of events, did not violate the ERA. The events of Macktal's last day of work require more specific analysis.

The ALJ found that Macktal engaged in protected activity on his last day

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when he indicated he would file complaints with government agencies, including the NRC. We cannot agree with the ALJ that threatening or being about to file a complaint with a government agency is protected activity under *Brown & Root, Inc. v. Donovan.* "[The ERA] contemplated a more formal action or proceeding, beyond the mere filing of internal complaints." *Ebasco Constructors, Inc. v. Martin*, *slip op at 3.* Although the pre-1992 ERA protected an employee who "is about to commence . . . a proceeding," we cannot avoid the strict limitations twice imposed on the Department of Labor by the Fifth Circuit. We note that one of the reasons the 11th Circuit rejected the Fifth Circuit's interpretation of the ERA was that it would not protect whistleblowers from "preemptive

retaliation, which would allow the whistleblower to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency." *Bechtel Constr. Co. v. Secretary of Labor,* 50 F.3d at 932-33, referring to *Brown & Root, Inc. v. Donovan*.[6]

For the same reason, we reject Macktal's belated attempt to characterize his request to be relieved of his duties as a protected refusal to work. Refusal to work is simply a subcategory of internal complaint, which was not protected in the Fifth Circuit prior to 1992. Even if a refusal to work were protected activity in the Fifth Circuit, we find that Macktal's alleged refusal here, does not meet the criteria of *Pensyl v. Catalytic* necessary to be protected.

It would have required considerable mental gymnastics on the part of Brown & Root managers to recognize that, when Macktal said he wanted to be relieved of his duties, he really meant he wanted to be reassigned to work that did not require him to violate NRC procedures. Macktal explained at the hearing what he really meant by those words, "[w]hat I was wanting to do is to be relieved of this type of work, relieved of these duties and maybe . . . given other duties doing things where I am not going to be doing this [work] where I am violating these procedures." T. 499. He conceded, however, that "I probably should have used the word current duties," *id.*, because "that is what was in my mind . . . that I was going to be transferred." T. 329. But Macktal did not even mention a transfer when Brown & Root "processed him out," that is, discharged him. T. 330-31. In fact, Brown & Root told Macktal they did not have any reason to fire him and wanted him to continue to work. T. 573-74. We agree with the ALJ that a reasonable person could only interpret Macktal's request as a resignation and could not be held responsible for failure to intuit what Macktal now claims was on his mind.

We find that Macktal has not proven that, before his discharge, he engaged in activity protected under the ERA as interpreted by the Fifth Circuit prior to the 1992 amendments and accordingly the complaint in this case will be denied.

Attorney's Fees for Success on Illegal Settlement Terms

At a much earlier stage of this litigation, Macktal entered into a settlement

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agreement and accepted payment of $35,000 ($15,000 to him and $20,000 to his attorneys) from Brown & Root under the settlement. Macktal then claimed before the Secretary, among other things, that certain terms of the agreement were illegal under the ERA and the Secretary agreed. *See Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec'y. Order Rejecting In Part and Approving in Part Settlement Between the Parties and Dismissing Case, Nov 14, 1989, slip op. at 10-13.[7] Macktal now seeks attorney's fees for his successful litigation of that issue.[8]

In *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), the Second Circuit held that "proferring a settlement agreement containing provisions restricting an employee's access to judicial and administrative agencies violates [the ERA]." 85 F.3d at 97. Macktal raised a similar, although not identical argument, in this case, that the terms of the settlement he at first agreed to, but then sought to avoid, illegally restricted his access to the courts and administrative agencies. This is related closely to the issue litigated in *Connecticut Power & Light* and resulted in the Secretary's order finding these restrictive terms illegal under the ERA.[9] We conclude that Macktal is entitled to attorney's fees and costs under 42 U.S.C. §5851(b)(2)(B) (1988), but that entitlement shall be limited to attorney time reasonably spent only on litigation of the legality of the restrictive settlement terms.

See, e.g., Hensley v. Eckerhart, 461 U.S. 424 (1983) (explaining the "lodestar" method of calculating attorney's fees); *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y. Interim Order Dec. 7, 1995, slip op. at 1-2 (requiring attorney to submit itemized accounting limited to work on issue litigated in particular case.) No attorney's fees are awarded for time litigating the other settlement issues in this case.

This case therefore is remanded to the ALJ to consider a petition for attorney's fees and costs as provided in this decision. For the reasons discussed above, the complaint in this case is otherwise **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

[ENDNOTES]

[1] A "Traveler" is a file folder that follows the work containing documents to be executed to certify that work has been performed according to applicable procedures. T. 99.

[2] Respondent offered these documents both to impeach Macktal's testimony and to limit damages by showing he would have been fired when Brown & Root learned of his criminal record.

[3] The documents are contained in a folder marked "Rejected Exhibits."

[4] We note that even if these documents were included in the record and had been placed under "seal" by the ALJ, whether they would be available to a member of the public in the future would be determined under the Freedom of Information Act and applicable Department of Labor regulations. *See* 29 C.F.R. Part 70; *Bonanno v. Stone & Webster Eng. Corp.*, Case No. 97-ERA-33, Board Dec. Jun. 27, 1997, slip op. at 2.

[5] The purpose of a motion for summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. Rules of Civ. Pro. 56, Advisory Committee Notes, 1963 Amendment. After a hearing at which testimony is heard and evidence received, the case is ripe for a decision on the merits.

[6] The Fifth Circuit may draw a distinction between an employee who is walking in the door of the resident NRC inspector's office when he is fired and one who only threatens to file a complaint with a government agency sometime in the future, but that would not aid Macktal.

[7] The Secretary rejected Macktal's other claims at that time: that no valid, binding agreement existed; that Macktal should not be bound by the agreement because he signed it under pressure from his counsel and under economic duress; that the Secretary should not approve any part of the settlement because of the illegal term; and that Macktal had the right to withdraw from the settlement at any time up to the point the Secretary approved it. *Macktal v. Brown & Root, Inc.*, Nov. 14, 1989 Order, slip op. at 4-16. The court of appeals affirmed the Secretary on each of these points except it held that the Secretary could not sever an illegal term from a settlement and approve the remainder. *Macktal v. Secretary of Labor*, 923 F.2d at 1155-58. After remand from the court of appeals, the Secretary disapproved the settlement and remanded this case to the ALJ for a hearing on the merits. *Macktal v. Brown & Root, Inc.*, Oct. 13, 1993 Order.

[8] Although we have reservations about entertaining a request for attorney's fees after a delay of eight years, we note that some courts have held that such motions are not barred by mere passage of time. *Price v. Hawaii,* 789 F. Supp. 330, 335 (D. Haw. 1992); *Walker v. Coughlin*, 909 F. Supp. 872 (W.D.N.Y. 1995) (four year delay in seeking attorney's fees not so unreasonable as to warrant denial of request). Our reservations are thus overcome by the expansive language of the ERA regarding the recovery of attorney's fees and the resulting incentive to pursue environmental whistleblower claims.

[9] Respondent argued that Macktal is not entitled to attorney's fees for litigation of the legality of the restrictive terms of the settlement because he already sought such an award in this case and it was denied. Our review of the pleadings cited by *Brown & Root* indicates that Macktal only requested that costs and fees be awarded as a sanction for Brown & Root's alleged improper conduct and the Secretary denied that request. *See* Order Disapproving Settlement and Remanding Case, Oct. 13, 1993, slip op. at 7-8. Neither the Secretary nor the Board has ruled on whether Macktal is entitled to an award of fees under the statutory fee shifting provision, 42 U.S.C. §5851(b)(2)(B), for success on the merits of the legality of the restrictive terms of the settlement.